IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1119 OF 2004

Mr.Rehmat Ali Baig .. Appellant

Versus

Mr.Minocher M. Deboo .. Respondent

Shri M.L.Palan with S.Shamim i/b Shamim & co. for appellant

Mr.R.H.Mirza for respondent

CORAM : P.V.KAKADE, J.

DATE : 2ND NOVEMBER, 2004.

P.C.:

1. Heard the learned counsel for both the parties. Perused the record including the pleadings as well as affidavit in reply.

2. In view of the circumstances Rule. Rule made returnable forthwith.

3. The impugned Order dated 29th September, 2004 passed by the City Civil Court, Mumbai in S.C.Suit No.4354 of 2004 filed by the Plaintiff to establish his right of preemption to purchase the property of which both the parties are co-owners. The learned Judge has observed in his Order that the advocate for plaintiff made a statement that defendant had already offered premises to the plaintiff so as to honour his right to preemption. Advocate for plaintiff stated that he was not agreeable for said offer. the whole cause of action of the suit was based on alleged right of preemption. If the right of preemption is not exercised by the plaintiff, the cause of action in the suit comes to an end and hence the suit came to be rejected under Order 7 Rule 11(a) of the Civil Procedure Code on the ground that it dos not disclose any cause of action.

4. In my considered view, after referring to the plaint as well as correspondence between the parties it is clear that the impugned order is ex-facie illegal. Initially it must be noted that whatever correspondence took place between the parties was pending the suit and not prior to the suit of which the learned trial judge

sought to hold that the offer of defendant was rejected by the plaintiff and therefore there was no cause of action. In my considered view, this view taken by the learned trial judge amounts to a total misconception of law. The cause of action is disclosed by the averments on the plaint and not by correspondence between the parties. The observation made by the lower court that plaint does not disclose further cause of action is totally erroneous in fact the perusal of the plaint would show that the cause of action is reflected clearly in the contents of the plaint and therefore, the learned judge should not have taken into account the correspondence between the parties and statements made on behalf of both the parties pending the suit. The duty of the lower court was to proceed with prior of the suit on merits as per the rules an adjudicate the dispute according to law. Instead of that the learned trial judge has attempt to shortcut the plaintiffs claim by resorting to provision of Order 7 Rule 11(a) of the Civil Procedure Code, which cannot be allowed in law.

5. In the result the appeal is allowed. The Order dated 29.9.2004 passed by the City Civil Court in S.C.Suit.4354 of 2004 is set aside. The matter is

remanded back to the Trial court to adjudicate according to law after giving opportunity to both the parties to lead their evidence, if any. The matter to be disposed of on merits within six months from the date of receipt of the Court Writ by the Lower Court. With these directions the Appeal stands disposed of with no order as to costs. Consequently the Civil application also stands disposed of.

6. In view of this situation the parties to maintain status-quo pending the Suit.